IN THE MĀORI LAND COURT OF NEW ZEALAND
TAITOKERAU DISTRICT

A20110003430

UNDER	Sections 18(1)(d), 37(3) and 24, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Waima C30A and Waima Topu B Blocks
BETWEEN	HIWI RANIERA HOHEPA Applicant
AND	JEAN CASSIDY, COLIN FITZPATRICK, MIHI HARRIS-BROWN, PATU HOHEPA, WIREMU KIRE, JADE MORUNGA, HAAMI PIRIPI AND RACHEL STIL AS TRUSTEES OF THE WAIMA TOPU B TRUST First Respondents
AND	NGAHUIA SUE BANKS, JASON TE KEETI GATES, DANIELLE HOHEPA, JULIAN HOHEPA, ELIZABETH PARI, MARLEINA TE KAAWA AND SAMANTHA TE PAIRI AS TRUSTEES OF THE DADDYBOY RAUA KO HIRIA HOHEPA WHĀNAU TRUST Second Respondents

Hearing: 4 and 5 December 2017, 167 Taitokerau MB 88-216
(Heard at Whangārei)

Appearances: Mrs James, for the Applicant
Mr Williams for First Respondents
Ms Terei for Second Respondents

Judgment: 12 December 2018

JUDGMENT OF JUDGE M P ARMSTRONG

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Introduction

[1] Waima C30A is a one acre block of Māori freehold land south of Taheke ("C30A"). The owners of C30A are the Ngā Uri o Eruini Te Hami Turi Hohepa Whānau Trust ("Eruini Whānau Trust") as to 0.667 shares and Marama Adams as to 0.333 shares. The applicant, Hiwi Hohepa, is a trustee and beneficiary of the Eruini Whanau Trust. There is no administration structure in place over C30A.

[2] C30A is bounded to the north, west and south by the Waima Topu B block. It is bounded to the east by State Highway 12. Waima Topu B is administered by the first respondents, the trustees of the Waima Topu B Trust.

[3] In 2002, the trustees of the Waima Topu B Trust entered into a tripartite agreement with Pihema and Hiria Hohepa so they could build a house on Waima Topu B. Pihema Hohepa, and then his descendants, lived in that house. The second respondents, the Daddyboy raua ko Hiria Hohepa Whanau Trust ("Pihema Whanau Trust"), was established for the benefit of Pihema's descendants.

[4] It has since been discovered that Pihema's house and utilities are located on C30A. Hiwi Hohepa seeks an order removing the house and an award of damages. All parties agree the house needs to be removed. The question is who should pay for it. The damages sought are opposed. This decision determines these issues.

Accepted facts

[5] Many of the facts in this case are not in dispute. The following is a summary of the facts accepted by both sides.

[6] On 6 May 1942, the Waima C30 block, 83 acres in size, was created by a consolidation order. Waima C30 was vested in Eruini Turi, and his brother Hone Turi, equally.[1] On 21 August 1951, Hone Turi's interests were vested in Eruini.[2] Eruini then became the sole owner of Waima C30.

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1 19 Hokianga MB 244 (19 HK 244).
2 23 Hokianga MB 246 (23 HK 246).

[7] In the 1950s, Mr Hohepa lived with his father, Eruini, on Waima C30. They built a house and other infrastructure and worked the land.

[8] In 1958, Waima C30 was amalgamated with Taheke No. 2, Waima C27A and Waima Topu A. These amalgamated blocks became Waima Topu B.[3] Prior to the amalgamation being completed, one acre was partitioned out and vested in Eruini solely. This became C30A and contained Eruini's house and associated infrastructure. The value of the house was taken out of Eruini's remaining shares in Waima Topu B.

[9] In around 1958, Mr Hohepa moved away from C30A to work. In the 1960s, Eruini also moved off C30A. Eruini authorised the management body administering Waima Topu B to graze C30A in exchange for paying the rates.

[10] Eruini died in 1989. On 9 May 1994, a succession order was granted vesting C30A in Hiwi Hohepa, Rawinia Joseph and Marama Adams equally.[4] Hiwi and Rawinia later vested their shares in the Eruini Whānau Trust.

[11] In 2002, the trustees of the Waima Topu B Trust entered into the tripartite agreement with Pihema and Hiria Hohepa. Under that agreement, Housing New Zealand granted a loan to Pihema and Hiria to build the house, and the trustees of the Waima Topu B Trust granted them a licence to occupy the site for that house. The agreement, and the license, refer to the house being located on Waima Topu B. Pihema and Hiria have passed away. Pihema's interests have been vested in the Pihema Whanau Trust.

[12] In 2009, Mr Hohepa returned to discover that his father's house had been demolished and a new house had been erected on C30A. On 29 March 2011, Mr Hohepa filed an application with the Court per s 24 of Te Ture Whenua Māori Act 1993 ("the Act").[5] The application came before Judge Ambler on 14 March 2012. He appointed a surveyor to prepare a plan to show whether Pihema's house was located on C30A or Waima Topu B.[6] That plan was prepared by Sam Lee of Thomson Survey Limited. It shows that Pihema's

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3 30 Whangarei MB 112 (30 WH 112).
4 77 South Island MB 18 (77 SI 18).
5 That application was amended on 14 November 2016 to include a claim for damages.
6 38 Taitokerau MB 132 (38 TTK 132).

house, along with water tanks, a clothes line, a septic tank and soakage fields, are located almost entirely on C30A.

[13] On 19 September 2014, Deputy Chief Judge Fox granted an order determining that Pihema's house is owned by the trustees of the Pihema Whanau Trust.[7]

[14] Mr Hohepa, the trustees of the Waima Topu B Trust, and the trustees of the Pihema Whānau Trust, have discussed this issue, both with and without assistance from the Court, to try and reach an agreement. While various offers were made, a final agreement was not reached.

Who should pay to relocate the house?

[15] As noted, all parties agree that Pihema's house, and the associated infrastructure, should be removed from C30A. The trustees of Waima Topu B have identified a suitable alternative location on the Waima Topu B block for the house. The question is, who should pay to relocate it.

[16] Mr Hohepa states the trustees of Waima Topu B should pay. The trustees of the Pihema Whānau Trust agree. The trustees of the Waima Topu B Trust argue that the trustees of the Pihema Whānau Trust should pay.

What legal principles apply?

[17] Section 24 of the Act provides I can grant relief per subpart 2 of Part 6 of the Property Law Act 2007 ("the PLA") where a building is wrongly placed on Māori freehold land. Section 322(1)(a) of the PLA provides that the owner of the land affected by a wrongly placed structure may apply for relief under s 323. Section 323(2) of the PLA provides that I may grant relief if I consider it is just and equitable in the circumstances to do so. Section 324 of the PLA provides that, when considering an application, I may have regard to:

(a) The reasons why the structure was placed on the land;

(b) The conduct of the parties; and

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7 87 Taitokerau MB 288-289 (87 TTK 288-289). Application A20120002552.

(c) The extent to which any person has been unjustifiably enriched at the expense of the person seeking relief because the owner of the land has become the owner of the wrongly placed structure.

[18] Per s 325(1)(e) of the PLA, I can grant an order directing any person to remove the whole or any part of a wrongly placed structure, and any fixtures and chattels, from the land.

[19] It is accepted that Pihema's house is a wrongly placed structure and that I should exercise my discretion to grant relief. I have to decide who I should direct to relocate the house and associated structures, as they will be responsible for the cost. In doing so, I may have regard to the factors set out in s 324 of the PLA. Ultimately, I have to grant relief that is just and equitable in the circumstances. Whenever I exercise discretion, I also have to take into account the principles and kaupapa of the Act as set out in the Preamble, ss 2 and 17.

Discussion

[20] I consider the trustees of the Waima Topu B Trust should bear the cost of relocating the house and associated infrastructure.

[21] I do not consider the trustees intentionally authorised Pihema to occupy land they did not own. Rather, they granted the licence for this site believing it formed part of the Waima Topu B block. Clearly, they were wrong. While the trustees may not have been aware that they did not own this land, they should have been aware.

[22] Firstly, the trustees should be aware of where trust lands are located. Whenever trustees are dealing with trust lands, or are authorising others to undertake activities on it, they must take care to ensure that they are dealing with the land they have authority over and are not interfering with, or are encroaching on, neighbouring lands.

[23] The evidence from the trustees differed as to whether they knew of C30A. Haami Piripi said he was not aware there was a separate title in this area, or that the land was in separate ownership. He said the area was used in common with the balance of Waima Topu B and so he thought C30A was part of the wider Waima Topu B block. Cheryl Turner, a

former trustee, said she was aware that this was a separate parcel of land but considered that it was also owned by the Waima Topu B Trust.

[24] At least one trustee, Dr Patu Hohepa, was aware there was a separate parcel of land and that it was not owned by the trust. On 15 May 1990, Dr Hohepa wrote to Mr Hohepa following his father's death. The final paragraph to this letter states:

> There is one area of land, barely an acre, which you may well have overlooked. Your father owns a road frontage section of 4350 square metres, with a Government valuation of $12,000.00, in Waima. The legal description of that section is Waima C30, Block VIII, Waoku SD. The Valuation Reference is No 680-38. We have, with your father's consent, grazed that acre and paid the rates. The decision on that land is now yours – with the consent of your mother. I hope this is of help to you.

[25] Dr Hohepa did not give evidence in this proceeding. It also seems that the other trustees were not aware of this letter or its contents. Despite that, the letter demonstrates that at least one trustee was aware of who owned the land, and the grazing arrangement that was entered into.

[26] Those trustees who did give evidence advised that Dr Hohepa was not involved in approving the tripartite agreement as Pihema was his brother. Ms Turner considered that a likely conflict of interest would have required Dr Hohepa to exclude himself from those discussions. Dr Hohepa did not sign the tripartite agreement or the license to occupy.

[27] It is also significant that the Waima Topu B Trust had been paying rates on C30A for almost 50 years. This was based on the original grazing agreement entered into with Eruini. Trustees have an obligation to keep records and accounts. If they failed to keep accurate records of the grazing agreement concerning C30A, that is their own fault. Trustees must also ensure that trust funds are applied for proper purposes. The fact that they were paying rates on this block for a prolonged period should have alerted the trustees to the fact that a separate parcel of land existed. A prudent trustee should also be aware of what the trust is paying rates for.

[28] When the trustees entered into the tripartite agreement, they knew they were authorising Pihema to build a house on this particular site. This is not a case where the trustees authorised Pihema to build on 'location X' and instead he built on 'location Y'.

Rather, the trustees authorised Pihema to build on this particular site on the mistaken belief that this was trust land.

[29] Clause 6.1(a) and (b) of the tripartite agreement states that the trustees of the Waima Topu B Trust covenant with the borrower (Pihema and Hiria Hohepa), and the lender (Housing New Zealand), that the trustees:

> (a) have full authority in terms of their ownership of the land to enter into this Deed;
>
> (b) know of no adverse interest, whether legal equitable, to the interests of the Borrower or the Lender.

[30] The trustees cannot enter into such covenants lightly. Under the tripartite agreement they assured Pihema and Hiria Hohepa, and Housing New Zealand, that they had authority and ownership of the land on which the house was to be located. The trustees should have ensured they actually had such authority and ownership before entering into the agreement. They are now responsible for the consequences of failing to do so.

[31] The trustees of Waima Topu B argue Pihema, and now his successors, are liable wholly, or in part, for placing the house on C30A, and so they should bear the cost of relocating the house. They submit:

(a) The tripartite agreement required Pihema to have the area surveyed;

(b) He failed to do so;

(c) If Pihema obtained a survey, the error would have been identified before the house was built on C30A and a new site could have been chosen;

(d) Pihema failed to note the tripartite agreement with the Court;

(e) This was in breach of the tripartite agreement;

(f) If the agreement was submitted for noting, the Registrar would have identified this issue preventing the house from being placed on C30A.

[32] I do not accept these arguments. Clause 4.1 of the tripartite agreement states:

> 4.1 The Borrower will apply the Principal Sum only for the following purposes:
>
> (a) to build a House on the site or to buy a House and transport it to and erect it on the site or to buy a House already located on the site which the Owners acknowledge remains a chattel capable of disposition separately from the site;
>
> (b) to pay the reasonable costs of survey to enable the House to be erected;
>
> (c) to pay any costs, fees and disbursements relating to the House and its construction as approved from time to time by the Lender.

[33] Mr Williams, for the trustees, contends cl 4.1(b) required Pihema to obtain a survey. I do not agree. This provision does not expressly require Pihema to obtain a survey. It provides that the funds from the loan can only be applied for the purposes set out in cl 4.1. This relates to the general costs associated with building the house including the cost of a survey. While this provision *allows* for a survey, it does not *require* a survey.

[34] More importantly, Mr Piripi advised that, at the time the agreement was entered into, the trustees did not require Pihema, or any other beneficiary seeking a licence to occupy, to obtain a survey. It would be unconscionable for the trustees to now rely on the failure to obtain a survey, when they did not require Pihema to obtain one and have not required this from any beneficiaries to date.

[35] I do not accept this issue would have been identified if the agreement was noted with the Court. A licence to occupy is noted by the Registrar. When doing so, the Registrar will routinely check whether the instrument has been executed properly and that it otherwise meets necessary requirements. However, the Registrar will not assess whether the proposed site is within the boundaries of trust lands. That is outside of the Registrar's function and expertise. It is the responsibility of the trustees, not the Registrar, to ensure that the licence site is on trust land.

[36] The trustees also gave evidence that it was Pihema who chose this site. That was not disputed. However, there is no evidence to show that Pihema was aware that this land was in a separate title or in different ownership. Mr Piripi said the trustees felt obliged to grant the licence to Pihema given his status as a kaumātua and his standing in the community.

While kaumātua should always be afforded the respect and reverence they deserve, that does not absolve the trustees of the responsibility of ensuring that the particular site was on trust land.

[37] Finally, Mr Williams argued that Eruini, and his descendants, contributed to Pihema's house being located on C30A, and so they should be held partly liable for relocating the house by way of contributory negligence. Mr Williams relied on the decision in *Hooker v Director General of the Department of Conservation – Waipoua 2B2B1B,*[8] where Judge Harvey found the Department of Conservation negligently contributed to the trespass in that case by failing to properly warn visitors to desist from walking past the affected land during high tide. Mr Williams submits that, in this case, Mr Hohepa and his whanau should have fenced off C30A clearly marking its boundaries.

[38] I do not accept this argument. Eruini authorised the Waima Topu B trustees to graze C30A in return for paying the rates. The trustees agreed to this at the time and used the land in this manner for almost 50 years. It would not be practicable to fence off a one acre section when it was being used for grazing in conjunction with the wider Waima Topu B block. The fact that it was not fenced off only heightened the care the trustees had to take when dealing with the land in that area to ensure they did not impinge on the rights of the owners in C30A. It appears that the trustees did not keep clear records about the grazing agreement, or the separate parcel of land, and did not pass this on to the incoming trustees who granted the tripartite agreement. The applicant, and his whānau, did not contribute to that.

[39] I determine that the house, and associated infrastructure, on C30A must be removed and relocated by the trustees of the Waima Topu B Trust at the trust's expense.

[40] The principles and kaupapa of the Act do not directly assist with deciding who should pay to relocate the house. Despite that, my decision is consistent with a number of those principles including promoting the retention and use of the land by the owners, settling disputes, ensuring fairness in dealings, and promoting a practical solution to the use and management of this land.

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8 *Hooker v Director General of the Department of Conservation – Waipoua 2B2B1B* (2009) 142 Whangarei MB 12 (142 WH 12).

[41] Mr Hohepa seeks that the house be relocated within three months of the order. There is no principled basis for this other than what Mr Hohepa considers is a reasonable amount of time. Relocating the house and infrastructure is no small feat. The trustees will need to engage a contractor and the logistical hurdles alone will be significant. Consent issues may arise. The trustees will also need to liaise with the trustees of the Pihema Whānau Trust to minimise any disruption with the move. This will all take time. I also need to take into account the approaching Christmas and New Year break. I consider the house and associated infrastructure should be relocated within 6 months. This will allow sufficient time for these issues to be properly addressed.

[42] The trustees advised, if the house is to be removed from C30A, there is a suitable alternative site on Waima Topu B, to the south of C30A. I leave it to the trustees to determine the appropriate site to relocate the house.

Should I award damages?

[43] Mr Hohepa argues that, due to Pihema's house being on C30A, he has been unable to live on the land himself and has been forced to pay rental and storage costs. He seeks the following damages:

(a) $56,811.80 (as at 16 November 2017) in rental costs, plus a further $106.40 per week until the house and associated fixtures and chattels have been removed;

(b) $10,296.00 (as at 16 November 2017) for storage costs, plus a further $88.00 per fortnight until the house and associated fixtures and chattels have been removed; and

(c) $25,000.00 for stress, frustration and inconvenience.

[44] Mrs James, for Mr Hohepa, contends the damages for rental and storage costs is consequential loss payable by the trustees of the Waima Topu B Trust. She submits these damages should be awarded based on the tort of trespass or negligence.

[45] In response, Mr Williams argues the claim for consequential loss is misconceived. He contends damages are available for injury to the land, or for use of the land, but not for consequential loss flowing from the land.

Should I award damages for consequential loss based on trespass?

[46] Mrs James relies on the commentary, *The Law of Torts in New Zealand*, which states damages are recoverable for consequential loss, such as loss of profits or expenses incurred as a result of the trespass, provided it is not too remote.[9] This commentary refers to the decision of the Court of Appeal in *Mayfair Ltd v Pears.*[10]

[47] In *Mayfair,* the defendant unlawfully parked his car in a building on the plaintiff's land. The car caught fire causing damage to the building. The Court held that the defendant was not liable for the damage because it was unintended, it was not reasonably foreseeable and could not reasonably be described as a direct or natural or immediate consequence of the trespass. However, the Court did not rule out damages for unintended or unforeseeable consequences provided they result directly from the trespass.

[48] This authority does not support Mrs James' argument. In *Mayfair,* damages were sought for injury or damage caused to the building on the owners' land. This was not a claim for the type of consequential loss sought in the present case, which seeks damages for an inability to use the land. In *Mayfair,* the Court of Appeal considered the defendant was not liable because the damage was unintended and was not reasonably foreseeable. In the present case, the trustees did not intend to grant the license over neighbouring land, nor did they intend to deprive Mr Hohepa from using that land.

[49] Mrs James was unable to provide any other authority which supports an award of damages for the consequential loss her client claims in this case.

Are the losses claimed a consequence of the wrongly placed structure?

[50] Even if I am wrong on that point, there is insufficient evidence before me to find that the losses claimed in this case are a consequence of the wrongly placed structure.

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9 Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington 2016) at 511.
10 *Mayfair Ltd v Pears* [1987] 1 NZLR 459.

[51] Mr Hohepa's daughter, Jacinda, gave evidence that Pihema's house is located on the only site suitable for building as the balance of C30A is too swampy. Mr Piripi rejected this. He stated there is sufficient space on the balance of the block to build using appropriate irrigation to drain the wetland.

[52] I am unable to rely on the evidence from either witness. Opinion evidence is inadmissible unless tendered by someone who is independent and who has suitable qualifications or expertise to comment on the matter. Ms Hohepa and Mr Piripi are not independent. They both have a vested interest in the outcome of this proceeding. Ms Hohepa and Mr Piripi have not demonstrated that they have suitable qualifications or expertise to comment on the stability of C30A and the appropriate locations for building a house.

[53] Mr Lee, the surveyor who was engaged by the Court, prepared a cover letter accompanying his plan. In that letter, he states:

> It was found that a significant proportion of C30A is made up of wetlands, not suitable for residential use.

[54] Mr Lee is a surveyor. He was engaged by the Court to prepare a plan to identify whether Pihema's house is located on C30A. It is not clear whether Mr Lee has suitable qualifications or expertise to comment on geotechnical engineering. Mr Lee did not give evidence in person and he was not questioned on this statement. It is not clear what he means when referring to "a significant proportion of C30A" being unsuitable for residential use, and in particular, whether there is a suitable site on the balance of C30A upon which Mr Hohepa could build.

[55] Mrs James has not shown that damages can be awarded for the consequential loss claimed in this case. There is no sufficient, and reliable, expert evidence to demonstrate that the location of Pihema's house prevented Mr Hohepa from building on, or using, the balance of the land. I cannot award damages for the consequential loss claimed under the tort of trespass.

Should I award damages for consequential loss on the basis of negligence?

[56] In order to demonstrate an action in negligence, Mr Hohepa must show that the trustees of Waima Topu B owed him a duty of care, which was breached, which caused loss, and that the loss was not too remote or was reasonably foreseeable.

[57] The same issues arise in this cause of action. There is no expert or reliable evidence to demonstrate that the location of Pihema's house prevented Mr Hohepa from building a house or a storage shed on the balance of the land. Mr Hohepa cannot prove causation.

[58] To properly advance this argument Mr Hohepa should have engaged a suitable expert, such as a geotechnical engineer, to comment on the stability of the balance of the land and to offer an expert opinion on whether the balance was capable of being used. Such evidence would also have to address whether any instability could be addressed through remedial measures such as drainage. In the absence of such evidence this claim has not been made out.

Should I award damages for the use of the land?

[59] I have found that Mr Hohepa has not made out his claim for damages for consequential loss. Despite that, I cannot escape the conclusion that he is entitled to *some* form of damages. There is no dispute that Pihema's house was wrongfully placed on C30A. An award of damages is appropriate to recognise the trespass that has occurred.

[60] The conventional approach is to award damages for the use of the land. Evidential issues arise in this case as there is little evidence establishing the quantum payable for use of this land.

[61] Mr Hohepa filed evidence of the rent he has been paying from 2010 to the present day. That is not a suitable measure as that relates to rent paid to occupy a residential house in Kaikohe. This is not an appropriate basis to assess market rent for using bare land in a rural area, and in particular, that part of C30A upon which Pihema's house sits.

[62] The only other relevant evidence is the licence fee that Pihema, and now his successors, paid to the Waima Topu B trustees, of $100.00 per annum to occupy the license

site. While there is no valuation evidence in this case, it is likely this is a nominal fee charged by the trustees to assist and encourage beneficial owners to occupy trust land. Despite that, this is the only evidence before me demonstrating payment for the use of this particular area.

[63] In closing submissions, Mr Williams argued that if I find an award of damages is appropriate, it should be assessed on the use of the land. Mr Williams submitted the license fee of $100.00 per annum, from the grant of the licence in 2002, to the present day, is a suitable approach to assess such damages.

[64] While there is no express claim for an award of damages for use of the land, I am able to exercise my jurisdiction to award such damages per s 37(3) of the Act. This was contemplated by counsel for the trustees who addressed me on this issue. Accordingly, further notice to the Waima Topu trustees is not required before exercising my jurisdiction to award such damages.

[65] I find that the trustees of the Waima Topu B Trust are liable to pay damages in the amount of $100.00 per annum from the grant of the licence to occupy in 2002 up until the date the house is removed and the land is reinstated. This is in addition to the rates the trust has paid for C30A over the relevant period.

Should I award damages for stress, frustration and inconvenience?

[66] Mrs James relies on the decisions in *Seagar v Brady,*[11] and *Matchitt v Whangara B20 Incorporation,*[12] where damages were awarded for inconvenience, emotional distress and anxiety due to trespass. Mrs James contends a similar award should be made in this case in the amount of $25,000.00.

[67] *Seagar* involved parties who owned adjoining sections on Waiheke Island. The respondent in that case removed three large limbs from a significant pohutukawa tree on his neighbour's property. The Court found the respondent's defence was based on untruths. The Court further found that this was a deliberate trespass and that general damages for distress and anxiety, and an award of exemplary damages, was justified.

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11 *Seagar v Brady* HC Auckland 174/96, 5 May 1997.
12 *Matchitt v Whangara B20 Incorporation* (2009) 191 Gisborne MB 249 (191 GIS 249).

[68] In *Matchitt*, this Court granted a conditional order requiring the committee of management to give the Matchitts a two-month notice period during which the Matchitts were to remove their fixtures from incorporation land. One of the committee members supervised the removal of the Matchitt's chattels and fixtures. The Matchitt's property was left on the lawn in a heap. The chattels were left under a tarpaulin but were exposed to the elements and suffered water damage. Deputy Chief Judge Fox referred to the following legal principles:

> [62] As trespass to land is actionable without proof of actual damage. An applicant is entitled to nominal damages as recognition and vindication of their possessory rights. (See *Roberts v Rodney District Council* [2001] 2 NZLR 402) In addition, general damages may be awarded for interference with the plaintiff's privacy and quiet enjoyment of the property: *Ramsay v Cooke* [1984] 2 NZLR 680. See also *TCN Channel 9 PTY Limited v Apping* (2002) 54 NSW LR 333; and exemplary or aggravated damages are also available in cases of trespass in the right circumstances. Where the respondent is guilty of deliberate trespass and arrogant disregard, aggravated damages may be awarded to compensate for additional injury to the applicant's feelings dignity or reputation. A further sum may be awarded by way of exemplary damages solely to punish a defendant and to deter others.

[69] Deputy Chief Judge Fox found that damages should be awarded in that case to signal how serious the trespass and resulting injury was. It is clear from these decisions that the court awarded damages as:

(a) There was a deliberate trespass;

(b) The respondent displayed high-handed conduct; and

(c) The respondent disregarded the plaintiff's rights.

[70] This does not apply here. The Waima Topu B trustees did not deliberately grant the licence over their neighbour's property. They held a genuine, but mistaken, belief that this formed part of the trust lands. While I have found that the trust must bear the cost of relocating Pihema's house, this is not a case where the trustees deliberately and wilfully trespassed on the land.

[71] Since learning that Pihema's house is located on C30A, the trustees have also taken steps to try and resolve the matter. This includes meeting with the parties to see if agreement could be reached, offering free accommodation (albeit for a limited period) to Mr Hohepa,

and offering alternative sites on trust lands for Mr Hohepa to build. While agreement was not reached, this is not a case where the trustees have acted in a high-handed manner or with complete disregard for Mr Hohepa's rights.

[72] For these reasons, I consider the decisions in *Seagar* and *Matchitt* can be distinguished and an award of damages for stress, frustration and inconvenience is not appropriate in this case.

Decision

[73] I grant the following orders:

(a) Per s 24 of Te Ture Whenua Māori Act 1993, and ss 323 and 325 of the Property Law Act 2007, directing the trustees of the Waima Topu B Ahu Whenua Trust to remove Pihema's house, and all associated fixtures, chattels and infrastructure, from the Waima C30A block, and to reinstate the land on Waima C30A to a good standard, within six months of this order; and

(b) Per ss 37(3) and 18(1)(d) of Te Ture Whenua Māori Act 1993, ordering the trustees of the Waima Topu B Ahu Whenua Trust to pay to the owners of Waima C30A damages in the amount of $100.00 per annum from 2 April 2002 until the date the house, chattels and associated infrastructure are removed from Waima C30A per order (a) above.

Pronounced at 3:00 pm in Whangārei on Wednesday this 12th day of December 2018.

M P Armstrong
JUDGE